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HAROLD B. WILLEY,

Supreme Court of the United States

OCTOBER TERM, 1953

No. 497

MORTON SOBELL,

Petitioner,

vs.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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MORTON SOBELL,
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MORTON SOBELL prays that a writ of certiorari issue to review a decision of the United States Court of Appeals, rendered October 8, 1953 (petition for rehearing denied October 31, 1953) which decision affirmed, summarily on motion to dismiss or affirm, an order of the District Court for the Southern District of New York, I. R. Kaufman, D. J., denying a motion, in the alternative, for a new trial under Rule 33 of the Rules of Criminal Procedure, or for a hearing pursuant to 28 U. S. C. 2255, to vacate a sentence of thirty years imprisonment imposed on conviction of conspiracy to violate former Title 50, Section 32, U. S. Code.

Opinion Below

The Court of Appeals granted summary affirmance without opinion (R. 16) on the ground that the matter had been decided in its earlier opinion (R. 113) reported 204 F. 2d 688. The opinion of the District Court is unreported (R. 103).

Statement of Matters Involved

The petitioner was convicted as a co-conspirator of Julius and Ethel Rosenberg and final judgment entered on the mandate of affirmance of the judgment and sentence on November 21, 1952, the Court of Appeals having affirmed (Frank, C. J., dissenting) the petitioner's conviction, 195 F. 2d 583, and this Court having denied review 344 U. S. 838, 889 (No. 111-12, O. T. 1952); see also 345 U. S. 965, 1003 (Nos. 687-719, O. T. 1952).

This petitioner's relationship to the new evidence.

This petitioner was convicted on a single count indictment at the same trial at which the Rosenbergs were convicted, but upon evidence which, although held sufficient to go to the jury, was of considerably less substantial character than that against the Rosenbergs. At best, the case against Sobell at the joint trial was "circumstantial", as conceded by the Solicitor General when we sought review of the original conviction here (Br. Opp. Nos. 111-12, O. T. 1952, p. 50, n. 22).

In all objectivity it can be stated that the case against Sobell was preposterously weak. There was not a scintilla of evidence to show, for example, that he knew Rosenberg had dealings with an agent of a foreign power, nor that he transmitted or agreed to transmit to Rosenberg anything pertaining to the national defense. Elitcher, the single witness against Sobell, gave no testimony that showed that either he, as the self-styled object of Sobell's solicitation, or Sobell himself, at any time within or without the six years in the indictment, completed the substantive offense. The testimony with which the prosecutor used Elitcher to incriminate Sobell consisted in no more than the injection of references to "espionage" or "the espionage business" (*in haec verba*, Nos. 111-12, R. 249, 211, 255, 257). into conversations otherwise routine and innocuous, and

on occasions where Elitcher had each time sought out and visited Sobell (see Pet., No. 112, O. T. 1952, pp. 41-3).*

When the jury at the original trial had been out a number of hours, they had agreed on a verdict on "two of the defendants" (Nos. 111-12, R. 1578) but there was sharp disagreement on a third, which required that they be locked up overnight. Obviously they could not have agreed on a verdict as to one of the Rosenbergs, without coming to a conclusion as to the other. Shortly before noon on the second day of the deliberations, they finally came to an agreement on the verdict against Sobell (Nos. 111-12, R. 1578-9).

It is reasonable to assume that Sobell was convicted, not so much because of the case that was made against him, but because of the effect on the jury of the testimony against his co-defendants. The sole opinion of the sole court that ever reviewed the convictions reached this conclusion (Nos. 111-12, R. 1664-5; 195 F. 2d at p. 600), but the court divided as to its effect.

The trial judge, in his charge, not only imputed to Sobell vicarious responsibility for the atomic espionage conspiracy (Nos. 111-12, R. 1552-3) of which he, perforce, absolved him at the time of sentencing (Nos. 111-12, R. 1620).

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* In addition to these conversations, there was only Elitcher's testimony about a trip late one evening to the neighborhood of Rosenberg's apartment with a can, said by Elitcher to have been said by Sobell to have contained "valuable" but otherwise unidentified "information" (Nos. 111-12, R. 260-1). Apart from its inherent improbability, as purportedly having occurred after Elitcher told Sobell he was being followed by F.B.I. agents (Nos. 111-12, R. 361), it was demolished by the cross-examination which showed that neither during his first, ten-hour (Nos. 111-12, R. 388-9) interrogation by Special Agents, nor during his second interrogation, nor during his Grand Jury testimony, did Elitcher tell of the incident (Nos. 111-12, R. 341, 339, 331). The record suggests that it was the desire of the agents to have a reference to "Bentley" that caused Elitcher to produce a conversation involving her name (Nos. 111-12, R. 337, 370). The prosecutor subsequently deprecated the testimony as "unnecessary" in conceding Elitcher had said nothing about it during his first period of cooperation (Nos. 111-12, R. 434-5).

He told the jurors that in considering whether *all three* defendants were guilty on the single conspiracy charge, they should allow themselves to be persuaded by the proposition that Government witnesses had said that the substantive offense had been consummated by *two* of the defendants:

> "Proof concerning the accomplishment of the objects of a conspiracy is the most persuasive evidence of the existence of the conspiracy itself. Simplifying this perhaps a bit more, success of the venture, if you believe it was successful, is the best proof of the venture or agreement. (In this case the Government claims that the venture was successful as to the atomic bomb secret.)" (Nos. 111-12, R. 1551-52.)

These references to the original record are pertinent because of the fact that the newly-discovered evidence to be discussed relates to the testimony of the Greenglasses, who did not know Sobell, or, except within the fiction of the conspiracy dragnet, testify against him. The foregoing aspects of the record relate not only to Sobell's initial status to claim a new trial because of such newly discovered evidence; they relate also to the position taken, in respect of the first two questions presented, that independent consideration should have been given below to the new evidence and its possible (or probable) effect on a jury considering Sobell's case.

Proceedings in District Court and Court of Appeals.

When it was learned that counsel for the Rosenbergs had come into the possession of evidence which was conceived to be of a character warranting a new trial under Rule 33 and invalidation of the sentence under Sec. 2255 of Title 28, this petitioner sought to join the motion for such relief that was made on June 8, 1953. He was permitted to do so by order to show cause (R. 89-90) which frustrated a condition sought to be imposed by the prosecutor on his participation in the motion, that would have required his appeal to be prosecuted at the same time as that of the Rosenbergs (R. 92-93).

Both motions were denied on the day they were heard, by the District Judge. Petitioner's counsel, not faced with an execution date, and deeming the issues involved on the appeal to require adequate time for preparation and consideration of the appeal, avoided the unusual procedure whereby the appeal on behalf of the Rosenbergs was heard less than a day after the decision appealed from, without briefs, and without counsel being in possession of a copy of the record when arguing (R. 2-3). The Rosenberg appeal heard on June 9 was adversely decided June 11 (R. 2-3). Review could not be sought from this Court by the Rosenbergs because of its denial of a stay of execution (four justices having voted for a stay, Journal, June 15, 1953, p. 254).

Before petitioner's counsel could procure the record on appeal to be filed, and the case docketed with the Court of Appeals (that Court does not accept the filing of a record without simultaneous filing of a completed brief (2d Cir. Rule 17(b), (h)) but while his time for doing so had been duly extended (R. 1, 2), the United States Attorney moved to "dismiss or affirm" on the ground that "this matter has already been considered and decided by this Court" (R. 11-12). Despite the differentiating circumstances claimed to warrant a "full dress" appeal, with appropriate time for the performance of the functions of both court and counsel, the motion for summary affirmance was granted, without opinion. After correspondence with the Court of Appeals (see post pp. i-iii) concerning the inadequacy of the record for review, a petition for rehearing was filed which included as an Exhibit the entire Record on both motions for a new trial. Rehearing was nevertheless denied, without opinion (R. 114).

The newly discovered evidence.

The newly discovered evidence, which is claimed to warrant relief under Rule 33 and/or Section 2255, does *not* include a recantation. It consists rather of evidence, more trustworthy than a recantation is commonly thought to be,

of a demonstrative character (the console table); of a documentary character (pre-trial statements of the principal prosecution witnesses, as evidenced by contemporaneous memoranda); and of an admission of commission of an independent crime by the main prosecution witness (uranium theft) which had a significant bearing on certain conflicts of testimony at the trial. Only the last raised any question of credibility, and yet it was not sought to deny it by counter-affidavit, and it had independent corroboration in one of the contemporaneous memoranda.

The trial court made no adverse finding of fact as to any aspect of the newly-discovered evidence. The government's opposing affidavits did not deny that the uranium theft had taken place, affirmed the authenticity of the documentary material (R. 100), and raised only a collateral question—not pressed on the argument and not passed upon by the trial court—as to the identity of the console table.

The evidence presented in support of the charge of a six-year conspiracy by the Rosenbergs and Sobell to violate the Espionage Act was wholly dependent on the testimony of two key witnesses, David and Ruth Greenglass. Their testimony was so indispensable to the case as a whole that the Court of Appeals, in its sole review of the conviction, stated that without the Greenglasses "the conviction could not stand" (Nos. 111-12, R. 1648, 195 F. (2d) at p. 592). The newly discovered evidence bears on many aspects of the testimony of the Greenglasses.

(a) The Console Table

In the course of the direct examination of Ruth Greenglass, in a context which made it quite clear that government counsel was aware of the answers his questions would elicit, she testified that she had seen at the Rosenberg home in 1946 a mahogany console table which Julius and Ethel had said to her was "a special kind of table" (Nos. 111-12, R. 706-7). Ruth went on to testify that Julius had turned the table on its side "to show us why it was so

special", and that *she personally saw,* when the table was turned on its side that "a portion of the table was hollowed out for a lamp to fit underneath it so the table could be used for photographic purposes" and that Julius said that when he used the table the room was darkened so there would be no other light and he wouldn't be obvious to anyone looking in, and that "he took pictures on microfilm of the typewritten notes" (Nos. 111-12, R. 706-7). David Greenglass testified that the Rosenbergs had told him that they had received a console table from the Russians as a reward for espionage (Nos. 111-12, R. 521-2) and that it was "used for photography" (Nos. 111-12, R. 631). He, too, said he had seen the table (Nos. 111-12, R. 522).

The table was the subject of considerable other testimony at the trial. The chief prosecutor in effect "testified" that such a table would have cost, in 1944-5, no less than $85 (Nos. 111-12, R. 1211) and a rebuttal prosecution witness testified that she had seen a table in a closet in 1944 or 1945, and that Mrs. Rosenberg had told her it was a gift from a "friend" (Nos. 111-12, R. 1408-12).

The defendants testified with respect to the table as follows: Julius testified that he had bought a new console table from R. H. Macy & Co. in 1944 or 1945; that he had paid "somewhere about $21.00" for it; that he never received one from the Russian government (Nos. 111-12, R. 1136-7). Ethel confirmed that it was bought at Macy's for $21 (Nos. 111-12, R. 1359-60) and denied that the conversations related by the prosecution witnesses had taken place (Nos. 111-12, R. 1331-2).

The console table figured in the prosecutor's summation as follows:

> "You heard them tell about the $21. console table. You heard the testimony about what was done to that console table, so that it was used for microfilming. How strange, on the one hand, the testimony from the Greenglasses that that was a present from the Soviet, the testimony from the Rosenbergs that they paid $21. for it in 1944 and 1945, when furniture was scarce, at Macy's; that it was delivered; and then a disinterested

> woman, even in the face of adroit cross-examination, resolute in her determination to tell the truth, telling the truth, she saw the table. Mrs. Rosenberg said it was a wedding present from a friend of Julius or her husband, whom they hadn't seen for many years, and this remarkably strange behavior taking the best piece of furniture in the house and storing it in the closet—why did they have to hide it? The source was from a friend, a friend with whom they had been working for ten years, in a type of activity which was perilous to the welfare of our country" (Nos. 111-12, R. 1527).

The Government's console table testimony was reflected in the summary of the evidence in the opinion of the Court of Appeals affirming the original convictions as testimony by Government witnesses that Rosenberg "transmitted information to Russia on microfilm equipment" (Nos. 111-12, R. 1643; 195 F. (2d) at p. 589).

In an attempt to corroborate their version, the defendants had subpoenaed at the trial a representative of R. H. Macy and Company but he testified that the relevant sales records had been destroyed by his company (Nos. 111-12, R. 1288-1293).

The physical table was not produced at the trial. The record shows that counsel for the defendants had stated (in another connection):

> "The Rosenbergs lived at 10 Monroe Street, and after Mrs. Rosenberg's arrest their home was abandoned. At any rate, I had the lease cancelled and their furniture was disposed of" (Nos. 111-12, R. 1181).

The record further shows, as to the contemporaneous impact of the console table testimony, that the defendant Julius Rosenberg had testified, on cross-examination, with respect to the search for the sales slip:

> "Now, I feel that if somebody looks through all the numbers through those years, they will find one for Julius Rosenberg, and *it is worth finding if it is such an important issue*" (Nos. 111-12, R. 1208).

The affidavits in support of the motion for a new trial (or alternative relief) disclose: the defendants Rosenberg, in October of 1950, because of the impossibility of raising bail and the "protracted litigation" they were faced with, decided to abandon their apartment (R. 58). They were told shortly thereafter by Mrs. Sophie Rosenberg that their furniture had been disposed of as "junk" (R. 58-9). The defendants' brother had so informed the attorney for the Rosenbergs (R. 60). In fact, however, defendants' sister had kept several items—two children's chests, a bicycle and some toys and the console table and caused them to be shipped to the basement of her apartment (R. 63). She had not been aware that the table was the subject of trial testimony and had not, in fact attended at the trial (R. 64-5). In June of 1951, still unaware of the significance of the table, she transferred it to a new home being opened by Sophie Rosenberg, who was likewise unaware of the significance of the table (R. 69-70). Thereafter, it was located by a newspaper man, who called attention of defense counsel to the discovery (R. 46-47, 88). Photographs were taken (which are a part of the record here, R. 51-56), and the table was offered to—but not accepted by—the trial judge, for inspection, on the hearing of the motion below.

The identity of the table produced and photographed was not disputed by affidavit of either David or Ruth Greenglass. The government's answering affidavits do not deny the identity of the table, but raise a question as to whether its underside was marked in chalk or crayon (R. 96-98). The trial judge made no finding as to the point.[1]

The demonstration made by the motion was: the table located and tendered was in no sense unique or "special"; it was not and had not been "hollowed" out for microfilm purposes; it bore serial numbers indicating—when deciphered by an employee of R. H. Macy and Company—that

[1] Counsel is informed by the custodian of the table that the markings are and were in crayon.

it was sold by that company in 1944 or 1945, and at a price which, with sales tax, would amount to approximately $21 (R. 35-36, 45, 51-56).

The trial judge made no findings as to the issue tendered by the table. He did not, in respect of the new trial motion, find whether or not it had been the only such table in the possession of the Rosenbergs; he made no finding as to whether it was or had been hollowed out; he made no finding as to whether the testimony of the Greenglasses with respect to the table was, as it would now seem, a complete fabrication. He refrained from finding, as the United States Attorney had requested, that the failure to produce the table at the trial was due to lack of diligence; in this respect he only said that certain relatives of Julius were "available" to "testify that they had seen, as they have stated in these affidavits, the console table" (R. 111). But the relatives did not state in the affidavits, nor was it a basis for the new trial motion that they would testify, that the table cost $21, or that it came from Macy's, or that it was not hollowed out. The table itself was the sole—and the conclusive—witness on these issues.

(b) The Pretrial Statements

The balance of the newly-discovered evidence [2] consisted of proof of a number of statements made *before* the trial, including one statement made before their apprehension, by David and Ruth Greenglass. Evaluation of the significance of the various statements requires a review of

[2] The manner in which the documentary evidence of 1950, from the files of O. John Rogge, counsel of Record for the Greenglasses and the Elitchers at the 1951 trial (Nos. 111-112, R. 37) came to be made public is indicated in the record (R. 70-81). Apart from the fact that this demonstrates that there could not have been lack of diligence, in the procurement of this evidence, it is submitted that the question of whether the documents were "stolen" from Rogge's files is of no consequence on this motion. They were plainly admissible. See *United States* v. *Miller*, 61 F. Supp. 919, 921; *Hernandez* v. *Brookdale Mills*, 201 App. Div. 325.

the principal subject matter of their testimony as to the events of 1944-5, and of 1950, claimed to show an espionage conspiracy, and without which the essential elements of a case under the statute would have been unproved.

Reference may be made to the opinion of the Court of Appeals of which review was sought in O. T. 1952, Nos. 111, 112, in its narrative of the Government's case. Four principal subdivisions may be found in this narrative, of which the second and fourth are relatively more complex than the first and third.

The First Subdivision: A visit in November, 1944 by Ruth Greenglass to her husband, supposed to be preceded by an exhortation by Julius to obtain specific information, from David, and her return with the information and its transmittal to Julius.

The Second Subdivision: Events of January-June, 1945, relating to "lens molds" on which David Greenglass had been working, and transmittal of information relating to them to Julius and Harry Gold. The sub-chapters in this subdivision may be described as that relating to (a) the first lens mold sketches (b) the meeting with a "Russian", (c) the incident of the jello box, and (d) the visit of Harry Gold to Albuquerque in June of 1945.

The Third Subdivision: The September 1945 visit of David Greenglass to New York, and the purported transmittal by him to Julius Rosenberg of a "cross-section" sketch of an atomic bomb.

The Fourth Subdivision: The events of 1950 which were supposed to show the efforts of Julius Rosenberg to see to it that David Greenglass would leave the country. It was in relation to these events that the purpose and motive of the prosecutor in bringing about the kidnapping (Nos. 111-12, R. 30, 1534) of Sobell, and the artificial merger of the two cases, was revealed, and bore its most striking fruit. (Nos. 111-12, R. 1529, summation of prosecutor.)

(i) *New evidence and the first subdivision.*

The testimony of Ruth Greenglass as to her November 1944 visit to her husband as summarized by the Court of Appeals is set forth in the margin.[3] According to her testimony, it was an integral part of the first message given to her by Julius Rosenberg that "his friends had told him that David was working on the atomic bomb, and he went on to tell me that the atomic bomb was the most destructive weapon used so far, that it had dangerous radiation effects." (Nos. 111-12, R. 679.)

Yet according to a memorandum of her attorneys, included in the new evidence, dated June 19, 1950, she had told them, after her husband's apprehension "She would not have allowed her husband to bring anything home after Hiroshima had disclosed what the project was" (R. 83). If she was not lying, when she told her attorneys in confidence in 1950 that she did not know until after Hiroshima what the project was, she was lying when she testified at the trial that she learned it from Julius ten months before Hiroshima.

At another point in this statement, the memorandum indicates, she told her attorneys, despite the trial testimony of this visit of November 1944 "She was there between March 1945 and March 1946" (R. 82). Another document—in form and content a report to his attorneys by David

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[3] "In November 1944, Ruth Greenglass planned a visit to her husband David, stationed as a soldier in the Los Alamos experimental station. Before her visit, Ethel and Julius Rosenberg, sister and brother-in-law of David Greenglass, urged Ruth to obtain from David specific information concerning the location, personnel, physical description, security measures, camouflage and experiments at Los Alamos. Ruth was to commit this information to memory and tell it to Julius upon her return to New York, for ultimate transmittal to the Soviet Union. David, reluctant at first, agreed to give Ruth the information Julius had requested. He told her the location and security measures of the station, and the names of leading scientists working there" (Nos. 111-12, R. 1642; 195 F. (2d) at p. 588-9).

Greenglass, and confirmed by them to be such (R. 73)—contains the following: "I told them [the F. B. I.] that on a visit to me in Nov. 1944, my wife asked me if I would give information. I *made* sure to tell the F. B. I. that she was transmitting this info from my brother-in-law Julius and was not her own idea" (R. 84). (Emphasis supplied.) The words which are italicized can be taken—or at least could be taken by a jury to mean—an inculpation, by prearrangement, of one not actually responsible.

The damning effect of the phrase "made sure" would have acquired further significance in the light of the deliberate plans of the Greenglasses (Nos. 111-12, R. 726) to lead the F. B. I. "to someone else" (Nos. 111-12, R. 719-20) and thus attempt to win their own immunity.

The story of the November, 1944 episode was affected, on the face of the original record with two infirmities: the apparent memorization of a "pat" story by Ruth Greenglass (Nos. 111-12, cf. R. 679-80 with R. 727-8) and the curious, never explained, sequence of events which made it possible for David Greenglass (who was not supposed to have been a spy, until his wife asked him to be, in this very conversation) without further inquiry or return to Los Alamos, to comply promptly with his wife's request for espionage information (Nos. 111-12, R. 425-7, 683-4).

(ii) *New evidence and the second subdivision.*

First sub-episode:

> "When David returned to New York in 1945 on furlough, he wrote out a fuller report on the project for Julius, and sketched a lens mold used in the atomic experiments" (Opinion of Court of Appeals, No. 111-12, R. 1642, 195 F. 2d at p. 589).

The document which conveyed to his attorney the "approximate statements to the F. B. I." which David Greenglass had made between the time of his arrest, and the first Saturday thereafter, was tendered on the motion below as Exhibit H (R. 84). Its authenticity was confirmed

(R. 73). Nowhere in this statement is mention made of the request by Julius Rosenberg for, or the turning over to him, of a sketch of a "lens mold used in the atomic experiments." This was the subject, nevertheless, of precise and detailed trial testimony (Nos. 111-12, R. 427-9, 438-43) supplemented with a reproduction of the purported sketch (Exh. 2). On cross-examination at the original trial, Greenglass had sworn that this incident was in fact reported to the F. B. I. in his first statement (Nos. 111-12, R. 587), a claim now belied by his contemporaneous report on the content of the statement.

An infirmity brought out at the original trial with respect to this aspect of Greenglass' testimony was that Julius Rosenberg would have been unable to get to the Greenglass apartment at the times that they claimed he had, without having been late to his employment with the Signal Corps of the United States Army (Nos. 111-12, R. 1074-76). The records of the Signal Corps, though obviously available to the prosecution, were not produced at the trial nor their absence explained.

Second and Fourth sub-episodes.

> "A few nights later at the Rosenberg home, the Greenglasses were introduced to Mrs. Sidorovich whom Julius explained might be sent as an emissary to collect information from David in New Mexico. It was agreed that whoever was sent would bear a torn half of the top of a Jello box which would match the half retained in Ruth's possession * * *. In June 1945, Harry Gold arrived in Albuquerque with the torn half of the Jello box and the salutation, 'I come from Julius.' He had been assigned to the mission by Yakovlev, his Soviet superior * * *. David delivered to Gold information about personnel in the project who might be recruited for espionage and another sketch of the lens mold, showing the basic principles of implosion used in the bomb construction" (Nos. 111-12, R. 1642; 192 F. 2d at p. 589).

Included in the testimony on which the foregoing was based was testimony as to a visit by Julius Rosenberg to Ruth Greenglass, some weeks after the initial Jello-box arrangements were said to have been made. During this visit, Julius was said to have told Ruth's sister to go into the bathroom and lock the door; to have then told Ruth of the timing for the meeting at which the Jello-box was to be used (Nos. 111-12, R. 693-4). This was corroborated, by the sister, to the extent that Julius had asked her to go into the bathroom and lock the door (Nos. 111-12, R. 787-8). Julius admitted that the visit took place but testified that Ruth had asked him to arrange the privacy so that she could discuss with Julius her concern about an idea David had to make money by stealing "things" from Los Alamos (Nos. 111-12, R. 1087-89). There was no evidence available at the trial to corroborate this version of Julius, and each of the Greenglasses denied that they recalled the subject of a visit by the F.B.I. agents to their home in February, 1950 (Nos. 111-12, R. 564-5, 717-18).

The new evidence related to several aspects of the Gold-Jello box story. An affidavit of Bernard Greenglass, bearing internal evidence of authenticity, and not contradicted on the motion, reports an admission by David Greenglass to him that David had stolen a sample of uranium from Los Alamos during 1946 and that Ruth knew about it (R. 44). In a pre-trial statement by Ruth to her lawyer, she had admitted that earlier in 1950 they had been subjected to interrogation and knew they were under suspicion concerning uranium theft (R. 83). Had this evidence been available at the trial, the jury might have viewed in entirely different light Julius' testimony that the February 1945 visit related to Ruth's apprehension about David's plans to steal from the Army.

The story of the Greenglasses concerning the Jello box half had original infirmities such as the failure of the Government to call Mrs. Sidorovich, who was on their

witness list (Nos. 111-12, R. 52); the timing of the cutting of the card at a point two months before Ruth's return to Los Alamos (Nos. 111-12, R. 685-6, 694) and the absence of any logical necessity that it had taken place before David's return to Los Alamos.[4]

The new evidence discloses that even when he was "making sure" to inculpate Julius Rosenberg in another respect David Greenglass was insisting to the F. B. I. agents: *"I didn't know who sent Gold to me"* (R. 84). This has bearing not only on the foregoing indications in the record that Ruth received the Jello box portions from a person unknown to this record, or from Yakovlev himself; it also has bearing on the elaborate testimony concerning an "identification signal"—variously stated by David, Ruth and Gold respectively as "Julius sent me", "Greetings from Julius", "I come from Julius" (Nos. 111-12, R. 457, 699, 825). In addition, Ruth had taken pains to testify that Julius had said that the bearer of the Jello box half would "bear the greetings from me and you will know that I have sent him" (Nos. 111-12, R. 689).

David had testified at the trial that Gold had paid two visits during the day; one in the morning, at which time he had nothing ready for him (Nos. 111-12, R. 457 ff). But in his statement to his lawyers concerning his statements to the F. B. I. he had said:

> "I stated that I met Gold in N. M. at 209 Hick St., my place. They told me that I had told him to come back later because I didn't have it ready. *I didn't remember this but I allowed it in the statement"* (R. 84, emphasis supplied).

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[4] The sequence of events related in this, and the preceding subepisode, may also be compared with the sequence in the indictments, as reflected in the third superseding indictment of January 31, 1951 (Nos. 111-12, R. 2-4). According to the indictments, the lens-mold incident did not take place until a week *after* the Jello-box transfer. This, too, was the subject of revision when the time came for testimony to be given at the trial.

The inconsistency is significant for more than its evidence of his willingness to allow words to be put in his mouth by eager prosecuting authorities; in its effect, the change created an aura of drama and significance that would not have existed if Gold had stopped by casually for material which, pursuant to Ruth's arrangements with Yakovlev or a person unknown to this record, Greenglass would have had ready for him.

The testimony of David at the trial was clear and unhesitating as to what he had given Gold, and a replica of purported sketches he had given to him introduced into evidence (Nos. 111-12, R. 459-63). His testimony was theatrically interrupted so that a "scientist" could testify as to the accuracy and secrecy of the sketches and their possible value to a foreign power (Nos. 111-12, R. 474-79). The new evidence, however, indicates that Greenglass had told his attorneys after his first exhaustive interview by the F. B. I.—

> "I also made [for the agents] a pencil sketch of the H. E. mold set up for an experiment. But this I'll tell you, *I can honestly say the information I gave Gold may be not at all what I said in the statement*" (R. 84, emphasis supplied).

Third sub-episode.

> "Julius introduced David to a Russian who questioned him about the atomic bomb operation and formula" (Nos. 111-12, R. 1642; 195 F. 2d at p. 589).

The testimony of David Greenglass in respect of this incident of January 1945 was quite explicit, both as to the subject of the conversation (Nos. 111-12, R. 453) and the highly dramatic fact that the man was a "Russian" (Nos. 111-12, R. 451, 453-4).

The new evidence includes a pre-trial written statement of David Greenglass which refers, however, only to a "man",

not necessarily a Russian, and discloses that he "could recall very little about which we spoke" (R. 84). And in an oral statement reported in his attorney's memorandum he said:

> *"He does not know if the man was a Russian and told the F. B. I. that he didn't know"* (R. 87).

The necessity for the creativity revealed in the invention of the "Russian" and the apparent insertion of Julius into the chain of events by which half of Ruth's Jello box was transferred to Gold is shown by the Trial Court's charge. In summarizing the evidence he pointed out that a "link with the Russians" (an element indispensable to a conviction, Nos. 111-12, R. 1554) was furnished only by either the "Russian" of January, 1945 or the nexus of the Jello box (Nos. 111-12, R. 1557).

(iii) *New evidence and the third subdivision.*

> "On a re-visit of the Greenglasses to New York in September 1945, David turned over a sketch of the cross-section and a ten page exposition of the bomb to Rosenberg" (Nos. 111-12, R. 1642; 195 F. 2d at p. 589).

The testimony supporting this portion of the opinion of the Court of Appeals appears in the trial record (Nos. 111-12 at R. 490-500, 510, and R. 702-05). This was supposedly the most ominous act of espionage testified to at the trial, and the courtroom cleared during testimony pertaining to it (Nos. 111-12, R. 500-10, 903). Yet, curiously, the indictment—even the third superseding indictment on which the trial was had—makes no mention whatsoever of the incident.

The pre-trial statement of David Greenglass to his lawyers is most pertinent here. It is clear that he had nothing to say to the F. B. I. at his first interviews about any

such incident,[5] although, if his wife's testimony at the trial be believed, he had ample opportunity before the interviews to probe his recollection and approached the interviews after having "planned to tell the truth" (Nos. 111-12, R. 726).

The trial judge made no reference to the omission in the portion of his opinion dealing with the motion for a new trial. In the portion dealing with the application for relief under Section 2255 he said David Greenglass "had not at the time of his earlier statements remembered fully all the *details* which he later supplied" (R. 108). It is a matter appropriate for independent consideration as to whether the delivery of a top secret "cross section" of the atom bomb was, as suggested, a mere *"detail"*. The trial judge did not so regard it when he imposed the death sentence (Nos. 111-12, R. 1614-15).

(iv) *New evidence and the fourth subdivision.*

> "In 1950, Julius came to David and told him to leave the country immediately, since Dr. Fuchs, one of Gold's collaborators, had been arrested; he, Julius, would supply the money and the plan to get to Russia. A month later, after Gold's arrest, he repeated the warning to flee, adding that he and his family intended to do likewise, and giving David $1,000.00. * * *
>
> "The Rosenbergs took the stand and testified as follows: * * * In 1950, David, according to Julius, excited, asked Julius to get a smallpox vaccination certificate from his doctor and to find out what kind of injections were necessary for entrance into Mexico. Ruth had told Julius that David stole things while in the Army, and Julius thought David was in trouble on this account. David asked for a few thousand in cash and when Julius refused, told Julius he would be sorry" (Nos. 111-12, R. 1643-44; 195 F. 2d at pp. 589, 590).

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[5] There was no question raised below about the admissibility of a pre-trial statement with a decisive fact omitted, rather than expressly contradicted. "A failure to assert a fact when it would have been natural to assert it amounts in effect to an assertion of the non-existence of that fact." 3 Wigmore, Evidence, § 1042, p. 733.

The issue of the role of Julius in respect of the possible departure of David Greenglass—noted by a Justice of this Court as having been treated not merely on the question of consciousness of guilt, but as an integral part of the conspiracy (346 U. S. at p. 318, N. 2 and relevant text)—is vitally affected by the new evidence with respect to the uranium theft by David Greenglass. The conflict in the versions of prosecuting witnesses and the defendants was resolved by the jury under circumstances in which it may well have been considered by the jurors that the Rosenberg story of David's "stealing things from the Army" in 1946 (Nos. 111-12, R. 1088-90) and his knowledge of Greenglass' alarm concerning F. B. I. investigation of uranium theft in 1950 (Nos. 111-12, R. 1119-21) was concocted to meet the necessity of defendants' case.[6] Rosenberg's denial of guilty knowledge of Greenglass' espionage must be viewed in an entirely different way when it is demonstrated, independently of his own story, that there was substance to his claim of suspicion that David was in trouble for stealing things from the Army.

The new evidence puts a wholly new light on the incidents of 1950. The prosecutor must have known about the F. B. I. investigation of uranium theft, disclosed by Ruth's pre-trial statement (R. 83) and yet allowed the Greenglasses to deny that they were aware of any purpose to the February 1950 visit (Nos. 111-12, R. 564-65, 717-18). The jury did not know and was not allowed to know of the actual theft of

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[6] The trial judge in his charge completely ignored Rosenberg's version, for he told the jury:

> "Julius Rosenberg admits that he inquired of Dr. Bernhardt regarding innoculations for a person going to Mexico but he states it was at David Greenglass's request *and that he did not know what the trouble was* or why David Greenglass would want to go to Mexico" (Nos. 111-112, R. 1562). (Emphasis supplied.)

Compare Nos. 111-12, R. 1121, first six lines.

a uranium sample by David Greenglass—who does not now contradict his brother's affidavit concerning his admission to this effect. The uranium theft is significant for far more than its extension of the criminal character of David Greenglass; it provides substantial corroboration for the Rosenbergs and discredit for the Greenglasses in evaluating the conflicting versions of the events of 1950.

(v) *Other aspects of the credibility of prosecution witnesses.*

In respect of the console table, the uranium theft and the prior inconsistent statements of the Greenglasses summarized above it can be said that each deals with an aspect of the substantive, circumstantial case of conspiracy made against the defendants, and not only tends to "impeach" the prosecution's witnesses but also to prove the contrary of their inculpating testimony. In addition, two aspects of the pre-trial statements relating to "mere" credibility are of such significance that, in this capital case, they ought to be called specifically to this Court's attention.

Mrs. Greenglass said of her husband—to counsel who collaborated with the prosecutor in sponsoring him as a witness whose testimony might and did result in a death sentence:

> "As to her husband, she stated that he had a 'tendency to hysteria'. At other times he would become delirious and once when he had the grippe, he ran nude through the hallway, shrieking of 'elephants', 'lead pants'.
>
> "She had known him since she was ten years old. *She said that he would say things were so even if they were not.* He talked of suicide as if he were a character in the movies but she didn't think he would do it" (R. 82; emphasis supplied).

During David Greenglass' cross-examination he denied that he had been led to believe that by testifying he would help himself to "any extent" (Nos. 111-12, R. 607-8). The

new evidence, however, indicates that it had been originally planned by the prosecutor and Greenglass' counsel that he was not even to be indicted as a defendant; that a charge of defense counsel at a pre-trial arraignment had prompted the United States Attorney to ask Greenglass' attorneys "to consider the question of whether it was OK that Greenglass be indicted here, in a superseding indictment, and not merely named as a co-conspirator"; that Greenglass' counsel reserved judgment and told the prosecutor "we would not want to give a definite commitment but that it would seem that such an arrangement would probably be approved by" their senior partner, and that they were subsequently informed "that Lane thinks Dave should agree to a plea in N. Y. on the New Mexico indictment" (R. 85-6).

* * * * * *

The trial judge made no findings, formal or otherwise, as to the issues tendered by the proffered evidence of pre-trial statements. He did not say whether he did or did not believe the statement of Bernard Greenglass concerning the admission, to him, of uranium theft by David Greenglass; nor did he make any findings as to the authenticity of the pre-trial statements or the accuracy of their contents as reflecting statements made at the time they were purported to have been made.

He made no finding as to the diligence with which the new evidence had been uncovered.

He did not attempt to consider separately whether the infirmities disclosed in the government's case by the new evidence would have resulted in a different view by the jury of the flimsy case made against Sobell.

Rule and Statute Involved

Rule 33, Federal Rules of Criminal Procedure:

> "New Trial. The court may grant a new trial to a defendant if required in the interest of justice. If trial

was by the court without a jury the court may vacate the judgment if entered, take additional testimony and direct the entry of a new judgment. A motion for a new trial based on the ground of newly discovered evidence may be made only before or within two years after final judgment, but if an appeal is pending the court may grant the motion only on remand of the case. A motion for a new trial based on any other grounds shall be made within 5 days after verdict or finding of guilty or within such further time as the court may fix during the 5-day period."

Section 2255, Title 28, United States Code:

"A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack may move the court which imposed the sentence to vacate, set aside or correct the sentence.

"A motion for such relief may be made at any time.

"Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate. * * *"

Statement as to Jurisdiction

The jurisdiction of this Court is invoked under 28 U. S. Code Section 1254(1). The judgment of the Court of Appeals for the Second Circuit was entered October 8, 1953; order denying rehearing was filed October 31, 1953. By order of Mr. Justice Jackson of November 18, 1953, the time to file this petition was extended to and including December 15, 1953 (R. 115).

Questions Presented

(1) Whether summary affirmance of an order denying petitioner a new trial, sought on the ground of newly discovered evidence in a capital case, should have been directed by the Court of Appeals where the newly discovered evidence tended to show unexplained fabrications and numerous pre-trial inconsistencies by the two indispensable prosecution witnesses with respect to material testimony relating to the crime charged, and the trial court had made no findings of fact as to the credibility of the new evidence, but rejected the motion because of his personal belief in defendants' guilt and because the credibility of prosecution witnesses, on other matters, had been attacked on the original trial and because the case had received the "meticulous attention" of other judges, on other issues, on other occasions.

(2) Whether, in such a case, the earlier affirmance by the Court of Appeals, on an appeal by co-defendants from the same order, justified summary affirmance of this petitioner's appeal, when it had been shown, in opposition to the motion for summary affirmance

(a) That the Court of Appeals had affirmed on the earlier appeal on the mistaken assumption that factual

findings had been made by the trial court and the earlier appellants had not, in the brief period of the pendency of the earlier appeal, been able to point out that no factual findings had been made;

(b) That the Court of Appeals had affirmed on the earlier appeal against the contention of the earlier appellants that the new evidence would "probably produce an acquittal", and although the crime charged had been a capital offense, the Court of Appeals had not considered, and counsel for the earlier appellants had not, in the period of the pendency of the earlier appeal, been able to present to it for consideration, the contention that the new evidence was such that there was a "reasonable possibility" that it would produce a different verdict;

(c) That the Court of Appeals could not, on the earlier appeal, since this petitioner had not joined therein, have considered the possible effect of the new evidence on a jury in the light of the relatively flimsy evidence of this petitioner's guilt.

(3) Whether summary affirmance of an order directing a hearing under 28 U. S. C. 2255 should have been directed by the Court of Appeals where fabrication and elaboration of the testimony of the chief prosecution witnesses, taken together with evidence of collaboration between government counsel and counsel for such witnesses, presented an initial circumstantial showing of knowing use of perjured testimony by the prosecution.

Reasons for Granting the Writ

Conventional considerations which are considered appropriate to warrant the exercise of this Court's certiorari jurisdiction are present here. The standards for initial and appellate consideration of motions for a new trial have

tended to be rigid in the federal courts despite an obvious need for greater flexibility when convictions can be secured on uncorroborated accomplice testimony. The dead hand of a period when such motions were altogether non-appealable has weighed on the brakes of judicial machinery which has operated with formulae which have come to be looked upon as rationalizing, rather than explaining, the denial of new trials. The sterile concepts of "collateral" and "impeach" have served to stifle, rather than advance, the wholesome administration of justice. This Court's decision in *Griffin* v. *United States,* 336 U. S. 704, constituted an unanimous warning by this Court (divided on an aspect here irrelevant) against a "too dogmatic" approach to the evaluation of the impact of evidence discovered after a trial. Whether the record now sought to be reviewed be seen as one involving refusal by this Court of Appeals to accept the binding force of *Griffin* or refusal by that Court to permit such an orderly presentation of the issues that counsel for the Rosenbergs were not able to bring home to it the significance of *Griffin* on the June 9 appeal, with the consequence that the attempt of counsel for the present petitioner to do so in October became ineffectual, there has occurred below a denial of justice warranting the exercise of certiorari jurisdiction.

The inference is hardly to be avoided, on the uncontradicted record, that important inculpating portions of the testimony of the principal government witnesses were the product of gross fabrication. Even if the trial judge had made the findings which could have protected his decision from review, under Rule 33 (as the Court of Appeals has incorrectly assumed) such findings, without a hearing, would not have served to prevent review under 28 U. S. C Section 2255. The console table fraud, the suppression of the evidence of the uranium theft, the obvious acceptance by complaisant witnesses of prosecutor-F. B. I. dictation as to the Gold visit, the "Russian", etc., and the cooperation

of counsel of record for the prosecuting witnesses with government counsel, all present a sufficient circumstantial case to warrant a hearing on the charge of knowing use of perjured testimony. The trial judge turned upside down the pre-hearing standards of evaluation by criticizing the showing of the motion as failing to "establish, I would say conclusively, so that I must deduce perjury was committed" the contentions of the defendants. This violation of the requirements of *Price* v. *Johnson*, 334 U. S. 266, and *Walker* v. *Johnson*, 312 U. S. 275, went unexplained in the *per curiam* opinion of June 11 of the Court of Appeals which that court later thought required it to deny any consideration to the appeal of this petitioner.

Apart from these considerations, we respectfully urge upon the Court the existence of special problems in the administration of the branch of criminal justice involved in these prosecutions. It is not only danger from external enemies that makes upright enforcement of the laws with respect to espionage of grave concern to our courts. It is notorious that the accusation of "espionage" has come to have a political value comparable to that which treason had in other times, and other places, as the hawser to lower the boom on political dissent. The ready availability of the charge of espionage to divert public opinion from governmental inadequacy or error, or as a device incidental to the promotion of opinion favoring a particular foreign policy, creates the constant danger that evidence offered by a prosecutor may be created as a *sequel* to his choice of defendant, and conclusion as to his guilt, rather than actually uncovered as a prelude. It is remarkable that the new evidence offered below so clearly portrays the possibility that this may have occurred, and yet is so unimpeachable that not a single adverse finding of fact was made as to its credibility. Nothing less than review by this Court can check the recurrent pattern, in espionage cases, of the sequence of trial and conviction by hue and cry

first, evidence (if any) afterwards, which has so deeply affected the whole fabric of our society.[7]

I. The motion for a new trial.

In denying the motions for a new trial, under Rule 33, the trial court did not make a single factual determination. He made no finding as to the authenticity of the documents or the credibility of the statements in the affidavits offered on the motion. The first decision of the Court of Appeals affirming, however, bears internal evidence that that Court had been persuaded otherwise in the brief period that the Rosenberg appeal was before them for consideration. If they had not been, it would be incomprehensible for their opinion to have not only cited *United States* v. *Johnson*, 327 U. S. 106, but also to have said "the trial judge • • • made findings of fact which the evidence amply supports" (R. 113, 204 F. 2d 688, 689).

The law relating to motions for a new trial on the ground of newly discovered evidence has grown on unfriendly soil. Until relatively recently it was the rule that the trial court had the last word and his denial of the motion "not assignable as error", e.g. *Andrews* v. *United States*, 224 Fed. 418; a rule that may have its roots in the fact that motions for *venire de novo* in the English courts were considered only by the trial judges in banc. *Hinton, Power of Federal Appellate Courts to Review Ruling on Motion for a New Trial*, 1 U. Chic. L. Rev. 111 (1933). After the exception was engrafted, that total refusal to consider the motion could be reviewed, *Harrison* v. *United States*, 7 F. 2d 259; see *Fairmont Glass Works* v. *Coal Co.*, 287 U. S. 474, 483, the courts began to go further and examine whether "discretion" was "abused" in palpably incorrect denials of the motion.

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[7] In some cases, the extra-judicial verdict is not followed by a trial in court, or even indictment. The present prosecution was launched by press-release (R. Nos. 687-719, R. 161-3); the newly discovered evidence includes a frank revelation of prosecutor-press collaboration in pre-trial exploitation of the issues, see R. 86, last par. of Exh. I.

But judges educated in an approach of complete "non-appealability" have tended even in relatively recent cases to characterize decisions below as "unappealable", *United States* v. *Forzano*, 190 F. 2d 687; cf. *Weiss* v. *United States*, 122 F. 2d 675. The hostility, marked by such expressions, having nothing to do with the merits of a particular case, as that such motions are "not regarded with favor" *Long* v. *United States*, 139 F. 2d 652; *Casey* v. *United States*, 20 F. 2d 752, has also been accounted for by the skepticism with which the large portion of new trial motions based on recantations have been viewed. Note (1932) 6 Temple Law Q. 251, 253; 5 La. Law Rev. 474, 476 (1943). And so, in *Harrison* v. *United States*, 7 F. 2d 259, Judge Learned Hand observed, in nevertheless reversing a decision refusing altogether to consider the affidavit of a recanting witness: "It is quite true that such testimony is for obvious reasons looked upon with the utmost suspicion, and that it is seldom enough, even from the mouths of witnesses for the prosecution" (at p. 262).

Curiously enough, however, the opinion denying the present motions in the District Court, regarded it as "worthy of re-emphasis" that the moving papers did not include a single recantation (R. 112, 104), as if recanting were, contrary to all previous judicial experience, to be regarded as more valuable than the unimpeached circumstantial evidence of the fabrications and growth of the stories of initially suspicious accomplice witnesses upon whom the convictions in this case rested.

There has never been any doubt about the prerogative of trial judges to disbelieve a recantation in the light of the personal opportunity he had to view the witness at the original trial, not only when the recantation is repudiated, *Blodgett* v. *United States*, 161 F. 2d 47; *McDonnell* v. *United States*, 155 F. 2d 297, but even where it is adhered to by the recanting witness, *Harrison* v. *United States*, 191 F. 2d 874; *Gordon* v. *United States*, 178 F. 2d 896. The type of factual determination required by the conflict between

the recantation and the original trial testimony is for him alone to resolve. And in *United States* v. *Johnson,* 327 U. S. 106, it was held that the prerogative to make factual determinations which would be unassailable unless they were "wholly unsupported by evidence" would extend to other factual aspects of trial witness' testimony on which it might be the burden of the later evidence to contradict the trial witness' testimony. But trial judges have not been immunized from review of a judgment of the *value* of the evidence tendered on new trial motions: in considering the consequences which flow from new evidence which has passed the test of truthfulness, they may not, because of their personal opinion of the ultimate guilt of the defendant, ignore the fact that the decisive issue is, how will, or how would have, the new evidence affected the jury. *Griffin* v. *United States,* 183 F. 2d 990; *Coates* v. *United States,* 174 F. 2d 959; *Hamilton* v. *United States,* 140 F. 2d 679; *Arbuckle* v. *United States,* 146 F. 2d 657; and compare *Helwig* v. *United States,* 162 F. 2d 837; *United States* v. *Miller,* 61 F. Supp. 919 at p. 924.

The decision of this Court in *United States* v. *Johnson,* 327 U. S. 106, was not intended to confer unbounded discretion on district courts in considering motions for a new trial, nor to cause courts of appeals to reverse the trend from complete non-appealability. The opinions of the Court of Appeals in *Johnson* and this Court's own opinion there show that it was the substitution by the Court of Appeals of its own judgment for that of the trial judge as to a subsidiary question of fact which brought about this Court's intervention. That this Court's opinion was intended to go no further was plainly shown in *Griffin* v. *United States,* 336 U. S. 704. While the Court divided in *Griffin,* it was only because the dissenters would have gone further, sooner, than the majority which was nevertheless quite explicit that the denial of a new trial should not have been thought by the Court of Appeals to have been immunized from review by the *Johnson* case if the new evi-

dence there involved had been *admissible* at the original trial. See 336 U. S. at p. 708-09.

The conviction of Griffin, and the rejection by the jury of his plea of self-defense, had been based on the testimony of five "live" government witnesses whose testimony was wholly incompatible with such a plea. The discovery by defense counsel that an open knife had been found in the pocket of the deceased—even though quite unknown to the defendant—was held to raise a serious question, which this Court required the Court of Appeals to reconsider, as to whether it "would not be too dogmatic, on the basis of mere speculation" to conclude "that the jury would not have attached significance to the evidence favorable to the defendant had the evidence been before it.[8]

The new evidence of the console table alone would have been strong enough, according to the *Griffin* standard, to warrant consideration by the Court of Appeals, as to its probable effect on the jury, had the evidence been before it. The *Griffin* evidence was even, as viewed by the majority of this Court, of such doubtful admissibility that it would not have warranted review by certiorari had it been ruled inadmissible below. The console table could not have been excluded as evidence at the trial of the *Rosenberg-Sobell* case. The fabrication concerning a "hollowed out" instrumentality for microfilming that would have been exposed had the defense been able to produce the table, might have had a decisive effect in resolution of the sharply contested issues of fact at the trial. To call it "cumulative" and "impeaching" as Judge Kaufman did (R. 110) is to employ these concepts in a manner which would not have been acceptable in the view this Court—or the Court of Appeals for the District of Columbia ultimately, 183 F. 2d 990—took of the evidence in *Griffin*. The open knife was "cumulative" in the conceptual sense: the defendant had

[8] The Court of Appeals later overruled itself and found it to be "too dogmatic" (183 F. 2d 990).

testified at the trial to threats of the deceased; it was "impeaching," it tended to show that there was something lacking in the credibility of the five "live" prosecution witnesses who had so conveniently been produced to support the prosecution's theory of the case.[9]

When the evidence of the console table is taken together with the evidence of the uranium theft, and the other pretrial statements which tend to show the trial testimony of the Greenglasses was the product of nine months of "preparation" for trial by Government counsel, Greenglass' counsel and the self-confessed spies themselves, rather than corresponding to events that had actually occurred, the conclusion seems required that on a new trial "it would probably produce an acquittal," as the standard formula goes. The hostility of the Court of Appeals for the Second Circuit to review of denial of new trials has resulted in transmuting even this formula into one which requires that the new evidence "furnish evidence of defendant's innocence," an inadmissible standard (see *On Lee* v. *United States,* 201 F. 2d 722, 726, dissenting opinion) which has not yet been presented to this Court on a record which it

[9] While words such as "cumulative" and "impeach" represent the type of sterile legal verbiage that is calculated to defy, rather than invite analysis, the cases suggest an appropriate limitation for their use. It would seem that "impeach" can mean no more than that the proffered evidence bears only on the "general" credibility of a government witness, such as after-discovered evidence of a prior, unrelated criminal record, i.e., *Thompson* v. *United States,* 188 F. 2d 652; *Murphy* v. *United States,* 198 F. 2d 87. And the term "cumulative" may possibly be applied to evidence on an issue as to which there had already been offered at the trial testimony of witnesses *other than that of the defendant testifying on his own behalf;* cf., *Gage* v. *United States,* 167 F. 2d 122; *Prisament* v. *United States,* 96 F. 2d 865; *Barber* v. *United States,* 142 F. 2d 805; *Howell* v. *United States,* 172 F. 2d 213. Unless such limitations be accepted, it is impossible to conceive of any sort of newly discovered evidence which is not "impeaching" in the sense that one or more of the government witnesses is made out a liar, if the new evidence be believed, or which is not "cumulative" in the sense that it supports a position taken by the defendant at the trial.

has considered to warrant review. Nevertheless the overall impact of the new evidence in this case is such as to meet this harsh standard.

The present record in any event requires review in the light of the concession of the Solicitor General in *Griffin* (expressly adopted by the dissenters there, and implicitly by the majority) that "where the offense in question is of a serious type, and particularly in a capital case" the rule of "probably produce an acquittal" is one that places "too heavy a burden on the defendant." In this view the standard to be applied is that "the newly discovered evidence relied on must be such that there is a *reasonable possibility* that its consideration by a jury at a new trial would result in the return of a different verdict" (emph. supp., Government's brief in 336 U. S. 704, at pp. 20-1).

The Court of Appeals did not consider, on the June 9 appeal, whether the "reasonable possibility" standard should have been applied to the evidence proffered in this case: counsel for the Rosenbergs were not afforded the opportunity for the research which would have enabled them to present it for the Court's consideration, and they did not. And when the motion to dismiss this petitioner's appeal came on to be heard, the Court of Appeals declined to consider whether it was required to apply that standard, or whether it would have brought about a different result (e.g., petition for rehearing, R. 18-20). The citation of *United States* v. *On Lee,* 201 F. 2d 722, the only other precedent cited in the per curiam opinion affirming on the Rosenberg appeal, would seem to indicate that the approach that was employed was incompatible with *Griffin* v. *United States.*[10]

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[10] The better rule, even in non-capital cases, would seem to be that the "reasonable possibility" standard should be applied in all cases. It should be a sufficient burden for any defendant to meet that he bring forward, in good faith and without suspicion of lack of diligence, evidence which "might well have raised a reasonable doubt with the jury." *Coates* v. *United States,* 174 F. 2d 959; or

Nor did the Court of Appeals, in unanimously affirming on this petitioner's appeal (which a district judge had ruled should be heard on its own merits, in rejecting the attempted imposition by the U. S. Attorney of a condition that the petitioner's counsel agree in advance to appeal simultaneously with the Rosenbergs, R. 89-90, 92-3) give any consideration whatsoever, although requested to do so (R. 3, 17, 19) to the fact that the evaluation of the effect of the new evidence should have been made in terms of the quite different case made against Sobell at the original trial.[11] The highly tenuous case against him made by a single substantive witness, was "nailed down" by the interplay made possible between the two cases by the kidnapping of Sobell from Mexico. The new evidence bears so heavily on the value of the "flight" evidence against Julius Rosenberg that jurors who might have been unaffected by the weakening of the prosecutor's case against the Rosenbergs, could have taken quite a different view of the preposterously weak testimony of Elitcher against Sobell. It does not require recanvass of the original trial record to support the proposition that a separate trial of Sobell would almost certainly have produced his acquittal, see, supra, pp. 2-4. Nor need it be established, if this Court were to grant review (or to direct the Court of Appeals to give more than summary consideration to Sobell's appeal) that the earlier affirmance of June 11th

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which is of a character that prevents a court from being able to say that the jury would have found, as it did, regardless, *Helwig* v. *United States*, 162 F. 2d 837, 840. It comes closest to the reality of the situation to say, as District Judge Moscowitz did in *United States* v. *Miller*, 61 F. Supp. 919, 924: "The court is unable to determine what effect it would have had on the jury had they known of the contradictory statements made by Contento—it may have changed the result."

[11] The prosecution contended that there was lack of diligence by counsel for the Rosenbergs, although there was nothing before the trial judge to contradict the showing of the motion on the point. But in no event could it have been claimed that there was lack of diligence, in respect of the subject matter of the new trial motion, by Sobell or his counsel.

was necessarily incorrect. The jurors who found such difficulty in agreeing on a verdict against Sobell might have been sufficiently shaken by the new evidence to have acquitted him; it need not be considered what the effect on the case against the Rosenbergs would have been.

Even if a reversal might seem to produce an awkward result, that will not prevent a Court from doing justice. Compare Lord Wright's remark, quoted by Frank, C. J., dissenting in *United States* v. *On Lee,* 201 F. 2d 722, 726: "Great judges have said that the function of the common law was the perpetual quest for justice. I should be sorry if quest for certitude were substituted for quest for justice."

II. The motion to vacate the sentence (28 U. S. C. 2255).

As alternate relief on the original motion, the petitioner sought, on the same record as that on which a new trial under Rule 33 was requested, a hearing on a motion to vacate the sentence under 28 U. S. C. 2255, on the ground that the prosecutor had employed, knowingly, perjured testimony to bring about his conviction.

Falsity there was, in the original trial testimony; we will not here repeat the showing in the Statement of Matter Involved, supra, pp. 6-22, on the many points where it is established, or strongly indicated that the Greenglass testimony did not correspond with the facts. *Perjury* there must have been, in relation to many of the falsehoods; the fabricated story of the console table is not explicable as due to faulty recollection, or delayed memory of "details"; nor are such other falsehoods as the denial of recollection of the uranium theft investigation, or the acquiescence in the prosecutor's version of the Gold visit, or the testimony that the man said "Julius sent me" by a witness who never knew (before being available for coaching) who had sent Gold to him (R. 84; *cf.* Nos. 111-12, R. 457).

Knowing use of perjured testimony there probably was; certainly there was a sufficient showing to justify a hearing as to the issues. The coercive processes of the Court were warranted so that unwilling witnesses could be required to appear, and give evidence orally under oath, to explain, or confirm, as the case might be, the more than merely suspicious circumstances: in regard to the console table, for example, the prosecutor either knew that there was no such console table (or he would have sought to produce it) or knew that his witness lied in saying that the testimony she was giving had been given to the Government at the time the table was still available for search, and seizure under a warrant (R. 34-5); likewise in regard to the probable creation of the story of the lens mold, elaboration of the story of the Gold visit, and its amendment to include "Julius," it is hardly conceivable that counsel for the Greenglasses, who conducted themselves as a branch of the prosecutor's office in the preparation of the case for trial, did not share with their allies their secrets as to the growth of the Greenglass stories.

All this was far more than the statute required as the basis for a *hearing*. The initial showing required is only that the evidence and the record of the case should not "conclusively show that the prisoner is entitled to no relief." 28 U. S. C. Sec. 2255. The statute under which petitioner thus moved was intended to be a substitute for, and provide an area of attack as broad as that previously provided by writ of habeas corpus. *United States* v. *Hayman*, 342 U. S. 205. Under the statute, a hearing is required if the claim was "not palpably unmeritorious." *U. S. ex rel. McCann* v. *Adams*, 320 U. S. 220.

The protective mantle of the Court's "discretion" does not surround the refusal of a hearing in the present case. The record is contended, above, to have been sufficient to warrant a new trial under Rule 33, and, in the absence of adverse findings of fact, not made here, it was. But in addition, the initial showing with respect to the console

table and the pre-trial statements was far more than sufficient to "serve to make the issues which must be resolved by evidence taken * * * (at a hearing) * * * not by pleadings and affidavits." *Walker* v. *Johnson,* 312 U. S. 275, 286-7.

Without a hearing, the trial court strove to resolve the inferences himself, and produce the explanations which the witnesses should have submitted to the test of oral examination at a hearing. The portion of his opinion relating to the application under 28 U. S. C. 2255 (R. 103-09) consists of a marshaling of conjectures to mitigate the force of the showing on the motion. The explanatory, or rationalizing conjectures (i.e., "One such table must look very like another," R. 106), and "indicative of the absence of a deal was the Government's recommendation at the time of sentence of fifteen years for David Greenglass" (R. 109), are followed by conclusions which would be appropriate only after a hearing, such as that "the defendants have failed to establish any impropriety" (R. 109) and that there was "lacking any showing that the Government knowingly used perjured testimony" (R. 106).

The topsy-turvy character of the pre-hearing approach taken by the trial court is indicated at another point in this portion of the opinion where he states that the evidence did "not establish, I would say conclusively, so that I may deduce that perjury was committed, that the Rosenbergs bought this very table from Macy's" (R. 105).

While counsel respectfully urges that the issue of the new trial motion should have priority, in that a new trial would appear to be warranted on the present state of the record, it is submitted that in no event could the decision denying relief under 28 U. S. C. Sec. 2255 be permitted to stand, consistent with this Court's decisions clarifying the requirements for a hearing under the former habeas corpus law, now codified in that statute.

CONCLUSION

It is respectfully prayed that this petition for a writ of certiorari to review the judgment of the court below should be granted.

Respectfully submitted,

HOWARD N. MEYER,
Counsel for Petitioner,
205 West 34th Street,
New York 1, N. Y.

HAROLD M. PHILLIPS,
EDWARD KUNTZ,
of Counsel.

APPENDIX

Correspondence with Court of Appeals for Second Circuit concerning state of the record after summary affirmance

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Letter of Counsel to Court

October 14, 1953

United States Court of Appeals
c/o Hon. Charles E. Clark, Circuit Judge
United States Post Office Building
New Haven, Connecticut

Att: Hon. Harrie B. Chase, Chief Judge

Re: U. S. v. *Sobell*

Gentlemen:

I learned yesterday of the decision of the Court of October 8, 1953 granting the motion of the United States Attorney to summarily affirm on the appeal from the order of Judge Kaufman of June 8, 1953 denying the motion on behalf of Sobell for a new trial on the ground of newly discovered evidence.

It is my intention to seek review by certiorari of the decision of the Court. However, when I discussed this matter with Mr. Bell yesterday afternoon, from the point of view of certifying the record to the Supreme Court for the purpose of my proposed petition for a writ of certiorari, he informed me that as he presently viewed the matter, the record would consist solely of the United States Attorney's moving affidavit and my answering affidavits.

This would create a very serious and unfortunate procedural problem since the questions raised on certiorari should and would necessarily be related to the judgment of the Court in respect of the claimed newly discovered evi-

dence tendered by the original motion of June 5th of the Appellants Rosenberg, the United States Attorney's answering affidavits with respect thereto, and the opinion of Judge Kaufman in denying the motion. My oral argument to this Court in seeking to resist the motion for summary affirmance was of course addressed solely to the content of the original Rosenberg motion and the questions that I desired opportunity to argue in respect thereto. However, as Mr. Bell views the matter, all of this material, which I shall refer to for convenience as the "Rosenberg New Trial Record" would not be part of the record certified to the Supreme Court.

The problem is made more acute by the fact that the "Rosenberg New Trial Record" was never certified to the Supreme Court after this Court's affirmance on June 11, 1953. A portion thereof was brought to Mr. Justice Jackson's attention when Mr. Bloch sought a stay of execution, but no petition for certiorari was ever filed because of the Court's denial of a stay, and hence, the record never went down.

May I respectfully request, therefore, that the Court give attention to this problem as to which I can only suggest that an appropriate solution would be to amend its order of October 8, 1953 to reflect the fact that the "Rosenberg New Trial Record" was necessarily considered and passed upon in granting the United States Attorney's motion for summary affirmance. Perhaps there may be an alternative solution, but in any event, it would seem appropriate in considering whether to review this Court's decision of October 8, 1953, that the Supreme Court should have before it not only the motion papers of October 5, 1953, but also the content of the "Rosenberg New Trial Record."

Respectfully yours,

HOWARD N. MEYER

HNM;rj
special delivery

Reply of Court, per Chase, C. J.

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

Chambers of
CHARLES E. CLARK
U. S. Circuit Judge
309 Post Office Bldg.
New Haven 6, Conn.

October 15, 1953

Howard N. Meyer, Esq.
Abzug & Meyer
205 W. 34th Street
New York 1, N. Y.

Re: United States v. Sobell

Dear Sir:

Your letter of October 14 addressed to the United States Court of Appeals has been received and considered by Judge Clark, Judge Frank, and myself.

It is suggested that you file a motion for the rehearing of the motion which was decided by this court on October 8, 1953, supported by such additional papers as you may be advised should be filed.

Very truly yours,

HARRIE B. CHASE
Chief Judge
United States Court House
Brattleboro, Vermont

CC: HON. CHARLES E. CLARK
309 Post Office Bldg.
New Haven 6, Conn.

HON. JEROME N. FRANK
P. O. Box 1794
New Haven 7, Conn.